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HIGH COURT OF CHHATTISGARH: BILASPUR
S.B. HON'BLE SHRI VIJAY KUMAR SHRIVASTAVA, J
MISCELLANEOUS APPEAL NO. 1288 of 2004

Appellants **Applicants** **Defendants**	1) Lakshmi Narayan S/o Gokul Prasad aged about 46 years 2) Shiv Narayan S/o Gokul Prasad Aged about 36 years Both resident of Talapara, Magarpara Chowk, Bilaspur, Tah & Dist Bilaspur.
	Vs.
Respondents: **Non-Applicants** Plaintiff No.1	1) Shyam Bai Wd/o Banshlal Aged about 76 years R/o Rajendra Nagar Bilaspur CG
Defendant No.2	2) State of MP now State of Chhattisgarh, through the Collector, Bilaspur, CG
Defendant No.3 to 5 are legal representatives of Phuliabai	3) Devi Bai aged about 56 yrs 4) Rajjan aged about 41 years 5) Rajani aged about 36 years Respondents 3 to 5 are Sons of Dwarika Prasad R/o Talapara, Bilaspur

PRESENT:

Shri Ram Kumar Tiwari, counsel for the appellants.

Shri Ahmed Hussain, counsel for respondents No.1, 3, 4 & 5.

Shri JD Bajpai, Government Advocate for respondent No.2.

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ORDER

(Passed on 24th February 2006)

This appeal under Order 42 Rule (1) (k) of Code of Civil Procedure (henceforth "the Code") has been directed against the order dated 24.09.2004 passed by Third Additional District Judge Bilaspur in MJC No.31/2002 whereby the applications filed by the appellants under Order 22 Rule 9 (2) of the Code and Section 5 of the Indian Limitation Act has been dismissed.

2) Facts material for disposal of this appeal in brief compass are that owner of the suit property was deceased Jankibai. Bansi Lal, Gokul & Dwarika were sons of Smt Jankibai and Bhagwandin. Bansi Lal and his wife Mainabai filed the suit on the ground that they are entitled for half share of the suit property along with Gokul. The appellants are sons of deceased Gokul. During the pendency of the First Appeal, Dulara bai, wife of Gokul who was brought on record also died. The suit was also filed against Phuliabai, wife of third son Dwarika Prasad of deceased Janki bai. It was claimed in the suit that the will executed by Janki bai in favour of Laxmi Narayan and Shiv Narayan, herein the appellants is invalid being contrary to law. Phuliabai also objected to the validity of alleged will and claimed one third share in the suit property. Appellants defended the suit on the basis of will executed by Janki bai.

3) The trial Court decreed the claim of Bansi Lal and also that of Phuliabai. The trial Court held that not only Bansi Lal but also Phuliabai was entitled to one third share in the suit property and accordingly the decree was passed that Bansi Lal, Gokul and Phuliabai are entitled to the extent of one third share in the suit property.

4) Appellants and their father aggrieved by the decree filed an appeal bearing No.31-A/92, which was allowed on 21.12.92. Thereafter Second Appeal numbered as 166/93 was preferred by Bansilal and Mainabai. In Second Appeal, Hon'ble the High Court of MP by an order dated 12.09.1994 set aside the judgment and decree of the lower appellate Court and remanded the case to the lower appellate Court holding that Phuliabai had died on 14.06.1986. She died during the pendency of the First Appeal; therefore, lower appellate Court was directed to re-hear the appeal and consider whether the appeal has abated only against Phuliabai or against all the respondents the learned lower Court after reconsidering dismissed the appeal.

5) The lower appellate Court after affording opportunity to both the parties considered the said issue and passed judgment and decree dated 07.02.97 in Civil Appeal No.20-A/96 whereby holding the appeal abated against all the respondents, dismissed the appeal.

6) Appellants aggrieved by the said judgment & decree preferred an appeal under Section 100 of the CPC before Hon'ble the High Court of MP bearing Second Appeal No.195/97 contending that the appeal did not abate against all respondents; therefore, it was not necessary to bring the legal representatives of Phuliabai on record. Second Appeal No.195/97 was decided by Hon'ble the High Court of MP vide order dated 15.04.1998 with an observation that the appellant instead of adopting the straightforward approach i.e. filing an application for bringing legal representatives on record tried to over reach the Court and failed in their attempt. Hon'ble the High court of MP also held that there is no question of reopening their case by further remand, therefore, dismissed the appeal.

7) Appellants thereafter filed an application under Order 22 Rule 9 (2) read with Section 151 of the Code along with another application under Section 5 of the Indian Limitation Act on 22.06.98 for an order to set aside the abatement and for bringing the legal representatives of deceased Phuliabai on record contending that they were not negligent and the application is bonafide. The application was opposed by respondents No.1, 3, 4 & 5.

8) Hon'ble the High court of MP at Jabalpur decided the Second Appeal No.166/93 on 12.09.1994 holding that the fourth respondent Smt Phuliabai, widow of Dwarika Prasad died during the pendency of the First Appeal on 14.06.1986. Therefore, the judgment

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pronounced by the lower appellate Court was nullity hence the judgment and decree of lower appellate court was set aside and the Third Additional District Judge Bilaspur was directed to rehear the appeal and to consider whether the appeal is abated only against the fourth respondent or against all the respondents. Admittedly, learned lower appellate Court considered the dispute and decided Civil appeal No.20-A/96 on 07.02.1997 and held that, legal representatives of Phuliabai have not been brought on record; therefore, the appeal abates. The said judgment and decree was challenged in Second Appeal No.195/97 before Hon'ble the High Court of MP and Hon'ble the High Court dismissed the same on 15.04.98.

9) Order 22 deals with the procedure to be followed where death, marriage insolvency of the parties happens during the pendency of the suit. The provisions are also applicable to appeals. Order 22 Rule 3 of the Code prescribes that in case one of the plaintiffs or sole plaintiff dies and right to sue survives, the Court on an application being moved within time prescribed for it, shall cause the legal representatives of the deceased to be made a party and proceed with the suit, more or less, same procedure is prescribed in case of death of one of the defendants or sole defendant under rule 4.

10) If the Court decides that the right to sue does not survive, it is a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the controversy,

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therefore, the order amounts to decree and is appealable. But in case the Court comes to the conclusion that right to sue survive; in that case, it is for the party to move appropriate application for bringing the legal representatives on record and if the concerned party fails to bring legal representatives on record within stipulated time, the suit or appeal as the case may and pursuant to that abate. Order of abatement or dismissal are passed. Consequent to default caused by a party, the order is passed and for setting aside the same, procedure has been prescribed under Order 22 Rule 9 of the Code. In case application for quashing abatement or dismissal of suit is rejected that order is appealable as an appeal against orders in accordance with Order 43 Rule 1 (k) of the code, therefore, the order of abatement or dismissal passed as a result of default committed by parties is not an adjudication of rights therefore is not a decree and no appeal lies against those orders.

11) Here in the instant case the first appellate Court after receiving the case on remand, considered the death of Phuliabai, who died on 14.06.1986 during the pendency of the appeal and held that no legal representatives have been brought by the appellants on record therefore appeal abates. The order passed by the first appellate Court dated 07.02.97 in Civil Appeal No.20-A/96 was not a decree. In spite of that, the appellants preferred second appeal bearing No.195/97 but failed to succeed in their attempt.

After dismissal of Second Appeal No.195/97 on 15.04.98, the appellants filed the instant application under Order 22 Rule 9(2) of the Code and Section 5 of the Indian Limitation Act on 22.06.1998.

12) Smt Phuliabai in whose favour partial decree was there, died on 14.06.1986. Therefore, within stipulated time from 14.06.1986 i.e. within 90 days appellants were required to file an application for bringing her legal representatives on record. Again when Hon'ble the High Court of MP in second appeal No.166/93 vide order dated 12.09.94 set aside the judgment and decree of first appellate Court and remanded the case to first appellate Court to consider whether the appeal abates as a whole or partly as a result of death of respondent No.4 Phuliabai who died on 14.06.86 during pendency of the First appeal. Again the appellants had opportunity to file application under Order 22 Rule 9 (2) of the Code for bringing legal representatives on record. Learned first appellate Court delivering the judgment and decree dated 07.02.97 in Civil Appeal No.20-A/96 held that for want of bringing legal representatives of Phuliabai, the suit abates as a whole. The order was not appealable. Instead availing the opportunity of filing application under Order 22 Rule 9 (2) of the Code, appellants filed second appeal before Hon'ble the High Court of MP. Hon'ble the High Court of MP passed judgment on 15.04.98 with following observations :-

> *" Merely because the lower appellate Court wrongly framed the issue on the point of date*

of date of death, it cannot be said that the appellants were prevented form filing the applications under Order 22 rule 9 of the Code of Civil Procedure and under Section 5 of the Limitation Act, for setting aside the abatement, condition of delay in doing so and bringing the legal representatives of Phuliabai on record. The appellants should not have taken new stand. They could have at least taken the stand in the alternative that abatement of first appeal is liable to be set aside and filed the necessary applications for setting aside the abatement, condonation of delay for bringing the legal representatives of Phuliabai on record. Instead of adopting the straightforward approach, they tried to over-reach the Court and failed in their attempt. There is no question of re-opening their case by further remand."

13) From the facts and circumstances stated above, it can safely be inferred that appellants knowingly did not file the application under Order 22 Rule 9 (2) of the CPC within prescribed time limit, therefore, neither it was established that they were not negligent nor their filing of instant application with delay is bonafide. It is evident that appellants willfully not followed the appropriate provisions to be applied at appropriate stages. There is nothing to show that they were prevented from filing the application at any stage. Neither there is any pleading to the effect that the appellants were prevented by sufficient cause from continuing the appeal, nor factual matrix as stated above supports their bonafide.

14) Hon'ble the High Court of MP in Second Appeal No.195/97 in its judgment dated 15.04.98 has held that it can not be said that the appellants were prevented from filing the application

under Order 22 Rule 9 (2) of the CPC and under Section 5 of the Indian Limitation Act for setting aside the abatement on condonation of delay in doing so and bringing the legal representatives of Phuliabai on record. The said finding also cannot be ignored.

15) I am of the opinion that learned Court below on appropriate reasoning correctly dismissed the application filed by the appellant vide impugned order and that order does not call for interference by this Court in its appellant jurisdiction.

16) In the result, the appeal is dismissed.

17) Taking into consideration the facts and circumstances of the case, parties shall bear their own cost.

Sd/-
V.K. Shrivastava
Judge

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